Phuar Kong Seng v Lim Hua

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 3–24–1606 OF 2003
ZALEHA ZAHARI J
29 DECEMBER 2004

Companies and Corporations — Meetings — Calling of meetings — Extraordinary general meeting — Shareholder failed to attend meeting despite proper service of notices — Whether a deadlock situation arose — Whether application pursuant to s 150 Companies Act 1950 be granted

The plaintiff and the defendant were the only shareholders of Chemfert Sdn Bhd (Chemfert). The plaintiff owned 51% whilst the defendant held 49% of the company. The plaintiff contended that there were several attempts to hold an extraordinary general meeting (EGM) of Chemfert, however, the defendant had failed to attend these meetings. The plaintiff filed an application pursuant to s 150 of the Companies Act 1950 (the Act) for the following orders which *inter alia* are: (i) that he be at liberty to call an EGM of Chemfert one week from the issuance of the order, and (ii) that the one week's notice with respect to the purpose of the EGM be given to the defendant or his solicitor and that if the defendant fails to attend the said EGM, the plaintiff, by himself attending the meeting, shall be deemed to constitute a meeting. The plaintiff's counsel submitted that the continued non-attendance of the defendant at meetings pursuant to notices properly issued had resulted in the quorum provisions being incapable of being complied with, thereby resulting in a deadlock situation. Therefore, it was impractical to call and conduct a meeting in the manner prescribed by the articles of association or the Act and that this was an appropriate case for the exercise of the power conferred upon the court by s 150 of the Act. In reply, the defendant alleged (i) misuse of power by the plaintiff; (ii) that he would be prejudiced should this application be allowed by the court as he would be losing his right to veto and (iii) he had been oppressed as a minority shareholder of Chemfert.

Held, allowing the application:

(1) The quorum provisions could not be regarded as conferring a form of veto on a minority party in a situation where a deadlock exists. The proposed resolutions involved the interests of the plaintiff and the defendant qua shareholders and as such shareholders, they are accordingly free to exercise their voting rights to advance their own self-interest (see para 17).

(2) The situation in the instant case gave rise to a conflict of interest situation. The defendant's non-attendance at the meetings, called

pursuant to the notices which were validly issued, had resulted in a deadlock situation (see para 18).

(3) Considering all the facts and circumstances of the instant case, it was impracticable to call for a meeting of Chemfert in the manner prescribed by its articles of association or the Act. Therefore, the company clearly could not function without the intervention of the court (see para 20).

(4) As to the allegation of being oppressed as a minority shareholder, the defendant ought to institute a separate proceedings (see para 19).

[Bahasa Malaysia summary

Hanya plaintif dan defendan adalah pemegang-pemegang saham di dalam Chemfert Sdn Bhd (Chemfert). Plaintif memegang 51% manakala defendan memiliki 49% saham syarikat tersebut. Mengikut plaintif, terdapat beberapa percubaan untuk membuat mesyuarat agung luar biasa (EGM) Chemfert. Akan tetapi, defendan gagal menghadiri mesyuarat-mesyuarat tersebut. Plaintif memfailkan satu permohonan selaras dengan s 150 Akta Syarikat 1950 ('Akta tersebut') untuk perintah-perintah yang antara adalah seperti berikut: (i) bahawa beliau boleh memanggil satu EGM bagi Chemfert seminggu dari pengeluaran perintah, dan (ii) bahawa notis seminggu itu yang berhubung dengan EGM tersebut diberikan kepada defendan atau peguamnya dan sekiranya defendan gagal untuk menghadiri EGM tersebut, plaintif, dengan menghadiri mesyuarat tersebut sendirian, akan dianggap menjadi satu mesyuarat. Peguam plaintif menghujahkan bahawa ketidakhadiran defendan pada mesyuarat-mesyurat tersebut secara berterusan walaupun notis telah dikeluarkan secara betul telah mengakibatkan kuorum tidak tercapai, dengan itu menyebabkan keadaan kebuntuan. Oleh yang demikian, ianya adalah tidak praktikal untuk memanggil mesyuarat sebagaimana yang diperuntukkan di dalam artikel-artikel persatuan atau Akta tersebut dan kes ini sesuai bagi mahkamah untuk menggunakan kuasa yang diberi di bawah s 150 Akta tersebut. Sebagai balas, defendan mendakwa (i) terdapat penyalahgunaan kuasa oleh plaintif; (ii) bahawa beliau akan diprejudiskan jika sekiranya permohonan ini dibenarkan oleh mahkamah oleh kerana beliau akan kehilangan hak vetonya dan (iii) beliau ditindas sebagai pemegang saham minoriti Chemfert.

Diputuskan, membenarkan permohonan tersebut:

(1) Peruntukan mengenai kuorum tidak boleh dianggap sebagai memberi kuasa veto kepada pihak minoriti di dalam keadaan kebuntuan. Resolusi-resolusi yang dicadangkan melibatkan kepentingan plaintif dan defendan sebagai pemegang saham dan sebagai pemegang saham, mereka bebas untuk menggunakan hak mengundi mereka untuk memajukan kepentingan mereka sendiri (lihat perenggan 17).

(2) Keadaan di dalam kes semasa menimbulkan percanggahan kepentingan. Ketidakhadiran defendan dalam mesyuarat-mesyuarat yang telah dipanggil secara sah melalui notis-notis yang dikeluarkan membangkitkan keadaan kebuntuan (lihat perenggan 18).

(3) Menimbang keseluruhan fakta-fakta dan keadaan kes semasa, ianya adalah tidak praktikal untuk memanggil sebuah mesyuarat bagi Chemfert mengikut peruntukan di bawah Perkara-Perkara Persatuannya atau Akta tersebut. Oleh yang demikian, syarikat ini dengan jelasnya tidak dapat berfungsi tanpa campur tangan mahkamah (lihat perenggan 20).

(4) Berkenaan dengan dakwaan defendan bahawa ia ditindas sebagai pemegang saham minoriti, defendan sewajarnya memulakan prosiding yang berlainan (lihat perenggan19).]

Notes

For cases on calling of meetings, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 385–389.

For cases on extraordinary general meetings, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 393–399.

Legislation referred to

Companies Act 1950 s 150

CM Loo (Abu Hassan & Assoc) for the plaintiff.
Azian bte Shaharum (Pathma Nalli & Partners) for the defendant.

Zaleha Zahari J:

[1] By this application the managing director and majority shareholder of Chemfert Sdn Bhd ('Chemfert'), is seeking for an order that he be at liberty to call an extraordinary general meeting (EGM) of Chemfert one week from the issuance of the order to consider, and if it deems appropriate, that one Ng Sook Wah be appointed a director of Chemfert. Further, that the one week's notice with respect to the purpose of the EGM be given to the respondent or his solicitor and that if the respondent fails to attend the said EGM, the plaintiff, by himself attending the meeting, shall be deemed to constitute a meeting.

THE LAW

[2] Section 150 of the Companies Act 1950 ('the Act') confers upon the court power to order a meeting if for any reason it is impracticable to call a meeting in any manner in which meeting may be called or to conduct a meeting in the manner prescribed by the Articles or the Act.

[3] In such a situation the court may either on its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or the personal representative order a meeting to be called, held and conducted in such manner as the court thinks fit and may give such ancillary or consequential directions as it thinks expedient including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.

[4] It is now incumbent upon me to set out the facts and circumstances presented before the court in the consideration of whether this was an appropriate case warranting the exercise of the power of the court conferred by s 150 of the Act.

BACKGROUND

[5] The grounds of the application are as set out in the affidavit of the plaintiff affirmed on 31 December 2003 (encl 2), that of Boo Thiam Koon affirmed on 13 February 2004 (encl 4), and that of Tan Chee Kian affirmed on 12 March 2004 (encl 5) whilst that in opposition is that affirmed by the defendant on 30 March 2004 (encl 7) and that affirmed on 20 May 2004 (encl 7A).

[6] From the affidavits filed in support and in opposition to the application it is common ground that the plaintiff and the defendant were the only shareholders of Chemfert, ie the plaintiff owning 51% whilst the defendant owns 49%. It is also not in issue that all of the cheques and the operation of the banking facilities of Chemfert requires both the plaintiff's and defendant's signatures.

[7] The plaintiff's contention is that, the defendant had set up another company, Agrowangsa Sdn Bhd ('Agrowangsa'), which is dealing in substantially the same fertiliser business as Chemfert. The plaintiff's contention is that upon the setting up of Agrowangsa the defendant had diverted some of Chemfert's customers to Agrowangsa which was accordingly detrimental to Chemfert.

[8] The plaintiff highlighted the attempts to hold several EGMs of Chemfert, ie firstly, pursuant to Notices in exh 'P8', secondly that pursuant to notice in exh P9 encl 2, and that the defendant had failed to attend these two meetings. According to the plaintiff the defendant had also failed to attend the meeting called pursuant to notice in exh P15.

[9] The plaintiff's counsel submitted that the continued non-attendance of the defendant at meetings pursuant to notices properly issued had resulted in the quorum provisions being incapable of being complied with which has resulted in a deadlock situation. In such a situation it was submitted on behalf of the plaintiff that it was impracticable to call and conduct a meeting in the

manner prescribed by the Articles or the Act and that this was an appropriate case for the exercise of the power conferred upon the court by s 150. It was submitted that for Chemfert to function it was necessary and the plaintiff was proposing to appoint an additional director for Chemfert.

[10] The plaintiff's counsel also submitted that the reason advanced by the defendant for non-attendance of the EGM called and in opposing this application as contained in para 26 of the defendant's affidavit in encl 7, that if additional powers were to be appointed the defendant would no longer have the power to veto, is not a valid reason in not allowing this application and should be rejected by the court. Counsel for the plaintiff submitted that it is a basic principle of company law that the majority rule prevails.

[11] As to the defendant's allegations of misuse of power levelled against the plaintiff, the plaintiff's counsel submitted that it was necessary for the defendant to institute separate proceedings which the defendant had failed to do. He was of the view that this court should not to go into the affairs of Chemfert unless brought before the court by way of separate proceedings.

[12] In his affidavit in reply the defendant admitted that his son had established the company, Agrowangsa and that Agrowangsa is also involved in the fertiliser business. Be that as it may the defendant took issue that Agrowangsa was marketing exactly the same products as Chemfert and averred that the target group and clientele of Agrowangsa and Chemfert were not the same. The defendant held out documents of Agrowangsa as evidence in support to show that the business of Agrowangsa had been conducted on an arms length basis.

[13] The defendant also denied to diverting dealings of Chemfert to Agrowangsa. As to the non-signing of cheques of Chemfert, the defendant admitted to not signing the same, the reason being, because he was doubtful of the *bona fideness* of the transactions in issue. The defendant alleged that the plaintiff, as managing director of Chemfert, had acted *mala fide* and had abused his power.

[14] The defendant averred that he had been prejudiced by the defendant's actions. The defendant also alleged that he would be prejudiced should this application be allowed by the court as he would be losing his right to veto. The defendant also alleged that he had been oppressed as a minority shareholder of Chemfert.

[15] In these circumstances the defendant's counsel urged the court to dismiss the plaintiff's application with costs.

FINDINGS

[16] It is a basic principle of company law that the corporate will is advanced by resolution of the company in general meeting in matters in

which the general meeting is competent to act and that the majority of members controls the decision-making in the company by the exercise of its voting power. A related principle is that voting rights are in the nature of property and members may exercise this power in their own interest.

[17] I am in agreement with the submission of the plaintiff's counsel that the quorum provisions cannot be regarded as conferring a form of veto on a minority party in a situation where a deadlock exists. The proposed resolutions involved the interests of the plaintiff and the defendant qua shareholders and as such shareholders they are accordingly free to exercise their voting rights to advance their own self-interest.

[18] As to admission of the defendant that his son had established a company which was also involved in the fertiliser business as Chemfert, and statement of non-involvement in the affairs of his son's business, the fact that the defendant was in a position to hold out documents of Agrowangsa is in my view very significant. I am in agreement that this situation has given rise to a conflict of interest situation. The subsequent conduct of the defendant in declining to sign cheques of Chemfert in the normal course of the running of business was certainly not without significance. Likewise the non-attendance of meetings called pursuant to the notices validly issued giving rise to this deadlock situation.

[19] As to the allegation of being oppressed as a minority shareholder, it was open for the defendant to institute separate proceedings and the court took note of the fact that the defendant had not instituted such proceedings to date.

[20] I am satisfied, taking into consideration all of the facts and circumstances of this case that it was impracticable to call for a meeting of Chemfert in the manner prescribed by its articles of association or the Act. The company, Chemfert, clearly cannot function without the intervention of the court.

[21] I accordingly allowed the application and granted an order in terms of prayers 1 and 3. I also directed that 14 days' notice be given to the defendant and the defendant's solicitors of such meeting. On the issue of costs, although prayed for in the application, in view of the applicant's counsel not claiming costs in his submission, I accordingly directed that each party bear their own costs.

Application allowed.

Reported by Izzaty Izzuddin